No. 98-1536

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

RANDON BRAGDON, D.M.D.,

Petitioner,

v.

SIDNEY ABBOTT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF RESPONDENTS SIDNEY ABBOTT AND MAINE HUMAN RIGHTS COMMISSION IN OPPOSITION

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STATEMENT OF THE CASE

This action under the Americans with Disabilities Act (ADA) involves petitioner Randon Bragdon, D.M.D.'s refusal to provide routine dental care on September 16, 1994 to respondent Sidney Abbott, solely because she is infected with the Human Immunodeficiency Virus (HIV). The Complaint, filed on December 1, 1994, alleged that Bragdon violated Title III of the ADA, which prohibits public accommodations from discriminating on the basis of disability. Petitioner has claimed throughout this case that he was entitled to refuse treatment to Ms. Abbott in his office because doing so would pose a "direct threat to the health or safety of others." 42 U.S.C. Sec. 12182.

The United States and the Maine Human Rights Commission intervened in support of Ms. Abbott. After discovery was concluded in the district court, all parties simultaneously filed cross motions for summary judgment on all liability issues. Contrary to Bragdon's current assertion to this Court that the issue of "direct threat" must be decided at trial (Petition at 24-25), he argued to the district court that he was entitled to summary judgment on that issue as a matter of law. *See* Motion by Randon Bragdon for Summary Judgment, September 19, 1995.[1]

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[1] In addition, at oral argument on the summary judgment motions, Bragdon's counsel represented to the district court that it was defendant's position "[a]bsolutely" that the case "can be resolved as a matter of law by summary judgment *one way or the other*" and "[t]hat there is no factual issue to be resolved." *See* Transcript of October 26, 1995 hearing in the district court, Court of Appeals No. 96-1643, Appendix at 439 (emphasis added).

On December 22, 1995, the district court denied Bragdon's summary judgment motion and granted summary judgment in favor of Ms. Abbott and the plaintiff-intervenors. *See Abbott v. Bragdon*, 912 F.Supp. 580, 588-589 (D. Me. 1995) (concluding, among other things, that a thorough review of the record demonstrated that Bragdon had presented only "speculation," "conjecture," and "tangential statistics" to support assertion of direct threat). The Court of Appeals affirmed. *See Abbott v. Bragdon*, 107 F.3d 934, 948 (1st Cir. 1997) (similarly finding that "[e]ach piece of [Bragdon's] evidence is too speculative or too tangential (or, in some instances, both) to create a genuine issue of material fact."). Bragdon never claimed that a trial was necessary on "direct threat" until after the district court had ruled against him on the cross-motions for summary judgment.

Last term, this Court granted certiorari on whether plaintiff had a disability and, if so, whether courts should defer to a health care provider's own judgment when determining whether the provision of care is a "direct threat to the health or safety of others" under Title III of the ADA. *See Bragdon v. Abbott*, ___ U.S. ___, 118 S.Ct. 2196, 2209-2210 (1998). This Court concluded that Ms. Abbott had a disability and that no deference should be granted to the defendant-health care worker in determining the existence of a direct threat. *See* 118 S.Ct. at 2207, 2210-2211.[2]

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[2] This Court concluded that the Court of Appeals correctly refused to give weight to petitioner's offer to treat Ms. Abbott in a hospital. 118 S.Ct. at 2211. Undisputed testimony in the district court demonstrated that Bragdon never had hospital

In discussing the direct threat issue, this Court explicitly stated that a health care worker, such as Bragdon, has a "duty to assess the risk of infection based on the objective, scientific information." *Id.* at 2210. Although the Court had declined to grant certiorari on whether petitioner raised a "genuine issue of fact for trial" as to the existence of a direct threat, the Court nevertheless "doubt[ed] whether petitioner advanced sufficient evidence to raise a triable issue of fact on the significance of the risk." *Id.* at 2210, 2212. Questioning whether the Court of Appeals gave the correct weight to some pieces of evidence in the record, this Court remanded the case solely to:

> . . . give the Court of Appeals the opportunity to determine whether our analysis of some of the studies cited by the parties would change its conclusion that petitioner presented neither objective evidence nor a triable issue of fact on the question of risk. In remanding the case, we do not foreclose the possibility that the Court of Appeals may reach the same conclusion it did earlier.

Id. at 2213.[3] This Court noted that the purpose of the remand was to "place a complex factual record in proper

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privileges, and that it is equally safe to treat a dental patient with HIV in a private dental office as in a hospital setting. *See id.*; Ms. Abbott's Brief in No. 97-156 at p. 3 n.5; and Ms. Abbott's Brief in Opposition to Petition for Writ of Certiorari in No. 97-156, p. 3 and n.3.

[3] A majority of this Court held that there was no need for a trial on the direct threat issue. *See* 118 S.Ct. at 2213 (Concurring opinion by Justices Stevens and Breyer finding that petitioner had not sustained his burden to raise a triable issue on direct threat, with Justices Kennedy, Souter and Ginsburg concluding

perspective," not to raise or reconsider any question of law. *Id.* at 2213.

On August 14, 1998, the Court of Appeals ordered that the parties simultaneously file supplemental briefs. Subsequently, the First Circuit granted Bragdon's motion to exceed the page limits set by the Court and to file a reply brief. The Court of Appeals heard oral argument on December 9, 1998.

In reviewing the entire record in light of the evidentiary questions posed by the remand, the Court of Appeals found that Ms. Abbott had met her burden of production as the moving party on summary judgment on multiple independent grounds. *Abbott v. Bragdon*, 163 F.3d 87, 89 (1st Cir. 1998). The Court further found that Bragdon's evidence was "still 'too speculative or too tangential (or, in some instances, both) to create a genuine issue of material fact.' " *Id.* at 90 (*quoting Abbott*, 107 F.3d at 948). Based on this review, the Court reaffirmed summary judgment for Ms. Abbott. *See* 163 F.3d at 89-90.

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that the Court of Appeals "may reach the same conclusion it did earlier.").

REASONS FOR DENYING THE PETITION

PETITIONER ALLEGES ONLY AN ERRONEOUS ASSESSMENT OF THE RECORD ON SUMMARY JUDGMENT.

I. There is No Basis for This Court to Utilize Its Supervisory Powers and Conduct a Factual Review of the Summary Judgment Record.

In his Petition for Certiorari, Bragdon asks this Court to exercise its supervisory powers and review the record supporting the grant of summary judgment. There is no reason or need for this Court to take this extraordinary step and relitigate record-based determinations which have now been made by the lower courts on three occasions. *See* United States Supreme Court Rule 10.

First, the selective pieces of evidence cited in Bragdon's Petition do not establish any error by the Court of Appeals. An examination of the entire summary judgment record is necessary to demonstrate that Bragdon did not present sufficient competent evidence. For example, Bragdon claims that the First Circuit ignored his expert's calculation of the risk. Petition at 7-9. Yet, the full record shows that those calculations made by Bragdon's expert were based on assumptions about dentistry which had no support in the record and thus were not competent evidence. *See, e.g.*, Brief of Plaintiff-Appellee Sidney Abbott in Court of Appeals, dated September 6, 1996, at 42-43. Bragdon's Petition is replete with other incomplete characterizations of the record.[4] The lower courts have now

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[4] In the Petition, Bragdon repeatedly claims that there is no evidence that universal precautions reduce the risk of HIV

thoroughly explored the summary judgment record *in toto* on three occasions and have found that Bragdon did not present sufficient competent evidence.[5]

Second, the fact that Bragdon disagrees with the outcome of the remand is not a basis for this Court to invoke its supervisory powers. Bragdon had a full opportunity to present evidence to the district court prior to that court's review of the cross motions for summary judgment. Moreover, he was permitted to present additional arguments to the Court of Appeals on remand about the state of the evidence below. The Court of Appeals did not disregard those arguments, it simply disagreed.

Contrary to Bragdon's characterization of the Court of Appeals' decision, that Court found that the 1986, 1987 and 1993 Guidelines and the American Dental Association Policy represent "only a fraction of the proof advanced to support Ms. Abbott's motion." 163 F.3d at 89. Following instructions from this Court, the Court of Appeals determined "testimony from numerous health experts [on behalf of Ms. Abbott] indicating that it is safe to treat patients with HIV in dental offices" was based on evidence available in September 1994. *See* 118 S.Ct. at 2212; 163 F.3d at 89. Moreover, the Court of Appeals

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transmission. Petition at 9-11. The Court of Appeals, however, determined that such a statement alone provides no probative evidence about the baseline level of risk. 107 F.3d at 948.

[5] Faced with his failure to meet his burden on summary judgment, Bragdon, without justification, now impugns the motives of the Court of Appeals. *See* Petition at 5 (claiming that the opinion of the Court of Appeals carries a "policy determination" that regardless of the evidence, "the case should not go to trial.").

found that the opinions of several prominent experts on behalf of Ms. Abbott about such evidence available in 1994 "likely suffice to prove Ms. Abbott's point." *See* 163 F.3d at 89. At the same time, the Court re-examined Bragdon's evidence, including the evidence about the CDC's categorization of seven "possible" cases of patient-to-dental worker HIV transmission. 163 F.3d at 89-90. Basing its review on this Court's analysis of the significance of that evidence,[6] the Court of Appeals found that the record established that the CDC's definition of "possible" cases was well known prior to 1994. *Id.* at 90. As a result, in accordance with this Court's instructions, the Court of Appeals found that those cases did not create a genuine dispute of material fact. *Id.*

II. The Petition Inappropriately Cites Post-1994 Evidence as Well as Evidence Not in the Record.

In attempting to establish factual disputes, Bragdon has improperly sought to rely on evidence that was not in the record or which post-dated the discriminatory denial of care. *See* 118 S.Ct. at 2211; 107 F.3d at 944. For example, on remand Bragdon attempted to introduce a statement of a CDC official made in 1998 characterizing the "possible" category of occupational transmissions as "probable." Petition at 15-16. In fact, the transcript of the testimony of Ronald Valdiserri, M.D. before the United

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[6] In discussing this evidence, Bragdon essentially argues that the Court of Appeals should have disregarded this Court's explicit directions and adopt an interpretation of those cases which Bragdon argued unsuccessfully to this Court last term. Petition at 14-15.

States Civil Rights Commission on November 12, 1998 referred on page 313 to the categories of either "possible" or "documented" occupational transmissions. Dr. Valdiserri later made reference to the same statistics but misstated the categories as "definite" and "probable." To correct his misstatement, Dr. Valdisseri submitted an affidavit explaining that he had misspoken and reiterating that the seven "possible" cases do not represent "probable" cases.[7] After briefing on Bragdon's motion to submit the testimony of Dr. Valdiserri, the Court of Appeals disregarded the November 1998 testimony because it post-dated September 1994, the date which this Court reaffirmed as the critical date for determining direct threat, 118 S.Ct. at 2211-2212, and because it was never a part of the summary judgment record. Moreover, the clear evidence was that Dr. Valdiserri simply misspoke, not that he was disagreeing with the CDC's long-standing surveillance definitions.

In his Petition, Bragdon similarly cites numerous other documents which are not in the summary judgment record in this case. *See, e.g.*, 318a, 414a, 418a, and the Journal of the American Dental Association article at page 15 of the Petition. The question before the Court of Appeals, initially and on remand, was whether summary judgment was properly granted on the extensive record established by both parties on cross motions for summary

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[7] *See* United States' Response to Appellant's Motion to Stay Final Decision (with Affidavit of Ronald Valdiserri, M.D.) and Plaintiff-Appellees' Opposition to Appellant's Motion to Stay Final Decision, Court of Appeals, December 7, 1998.

judgment below. Bragdon cannot add to the record now in an attempt to relitigate the issues in this Court.

III. The Court of Appeals' Decision on Remand Raised No Issue of Law.

Although primarily asking this Court to conduct a de novo review of the summary judgment record, Bragdon identifies legal issues which he would like this Court to address. *See* Petition at 17-28. These issues, some of which Bragdon attempted to argue to the Court last term,[8] were not within the scope of the remand and therefore were not reconsidered by the Court of Appeals.

The legal arguments that petitioner now raises have all been heard before in this very case, both by this Court and the Court of Appeals. This Court should not now indulge Bragdon's attempt to relitigate last term's decision and reconsider the meaning of direct threat in the context of this record.

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[8] For example, Bragdon now repeats the argument he made to this Court last year that cases finding that certain HIV-infected health care workers posed a direct threat to patients established that Ms. Abbott posed a direct threat to Bragdon. *See* Petitioner's Reply Brief in 97-156 at 19. From these cases, petitioner claims that there is a split in the circuits justifying the grant of certiorari. However, the applicability of these cases to the instant case was raised before, and there is no justification warranting the reconsideration of the issue.

CONCLUSION

Bragdon has had multiple opportunities to litigate the issues raised in this case. His arguments have received a thorough review, first by the district court, twice by the Court of Appeals, and once by this very Court. There is no basis to reopen this case yet again. For the reasons given above, Respondents Sidney Abbott and the Maine Human Rights Commission respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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